Written Statement of

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I am greatly honored and humbled to have the opportunity today to speak with you about the president's and the Senate's important responsibilities in filling a vacancy on the U.S. Supreme Court. I am mindful of the importance Justice Anton Scalia has had in my life – he was one of my law professors and was an influential justice for the entirety of my career as a law professor to date. As I undertake my charge, I hope you will appreciate that I speak only for myself and not for the institution where I teach or anyone for whom I have previously worked.

Justice Scalia's passing presents our national leaders with the important responsibility of making the 116th appointment to the U.S. Supreme Court. The question is not whether they will fulfill their responsibilities or whether an appointment will be made. There is no question that the President will nominate, and the Senate will confirm, someone to replace Justice Scalia, someone to be the 117th justice ever appointed and the eighth person to fill the seat Justice Scalia proudly held for nearly 30 years. The only question, or at least the only constitutional one of importance to us today, is the timing of that appointment.

Thankfully, this is not a hard question to answer, at least insofar as the Constitution is concerned. The usual sources of constitutional law provide some guidance. The Constitution provides presidents with the authority to nominate Supreme Court justices. The text, and the obvious inference from it, provides that a president, for as long as he or she is president, has this authority. There is no language within the Constitution – and nothing within the structure of the Constitution – providing that this authority is suspended, diminishes, or disappears at any particular point in time of a presidency. For as long as someone is president, he or she has this authority to make Supreme Court nominations (presuming there are vacancies) and may exercise this authority as he or she sees fit. No other inference makes sense. Nor does the Constitution indicate that the Senate's duty to consider a nominee to the Court is suspended or diminishes or disappears at any particular time, including within the last year of a president's term in office.

Much of the discussion, in the days since Justice Scalia's death, has been about what historical practices can tell us about the president's and Senate's respective responsibilities with respect to filling a vacancy on the Supreme Court. We've heard a lot of numbers of late, though I think historical practices in this domain are clear. To begin with, not a single president has refused to make nomination to fill a Supreme Court vacancy, regardless of its timing. No president has abdicated the discretion, even when they have been lame ducks. Only three presidents have not made a Supreme Court nomination – two, who died prior to ever having had the opportunity (William Henry Harrison and Zachary Taylor) and the third, Jimmy Carter, who is the only president to have completed a term without having had a vacancy on the Court to fill. With only one arguable exception, the Senate has never declared that it will not hold a hearing or fail to consider a Supreme Court nomination before the president has even had the chance to make one. My initial, quick survey indicates the only exception may have been Andrew Johnson, whom Congress held in such disdain that it prospectively abolished two

seats on the Supreme Court to prevent the president from filling them if either or both of the occupants died. As soon as President Ulysses S. Grant came into office, Congress re-established the seats, bringing the Supreme Court to its present size of nine. Rather than some grand principle at work, it was intense partisanship and disdain for President Johnson that led the entire Congress to do whatever it could (including attempting to remove him from office) to stop the president from wielding the powers of his office. I do not find President Obama's circumstances to be analogous in any meaningful or principled way to President Johnson's, including the facts that the seat vacated because of Justice Scalia's death still exists, Barack Obama has twice been elected president, and the Senate has up until now actually considered every nomination that has been made to the Supreme Court (and affirmed the vast majority). Refusing to hold a hearing on a Supreme Court nomination – or refusing to take any action on a nomination before it has been made – is simply unprecedented in our history. The refusal is not grounded in the Constitution, except in the coarsest sense – it is a willful abdication of authority based on partisanship. There are no grand principles at work here.

I hasten to say that we should not make too much of these numbers or of the past. The most that the past can tell us is what may be permissible within our constitutional system. The past merely tells us about what, if any, conventions there may be when it comes to the timing of Senate action, but conventions are just suggestions, nothing more. They do not constitute constitutional rules. To be sure, past conventions do not support the Senate's abdicating its constitutional discretion and authority. In fact, the Senate has actually confirmed justices during presidential election years and even in the few weeks or months thereafter; and, as I've said, it has never flat-out refused to at least consider any Supreme Court nomination made by a president, even in an election year. The past does not tell us what the president should do. Nor does the past, more relevantly, direct what you and your Senate colleagues should do under the current (but hardly unprecedented) circumstances. The past does not bind us.

Those of you who know me know that I am loathe to say how you should exercise your constitutional authorities. You know better than I. I am not here to tell you what to do. What I can say is that, after having been a student of the Constitution throughout my life, a student of the man next to me, and of the man whose seat you will have a chance to consider filling, that the Constitution ultimately demands of our leaders their very best selves. The Constitution demands our best selves, not our most partisan ones. If we are to learn anything from our past, it should be that the most important factor, which you are allowed to consider, is what kind of precedent will the Senate establish here. And the most profound, and influential precedents do not involve abdications of opportunity or authority or partisan machinations. They involve leaders, who have chosen to rise to the occasion, putting aside, as best they can, their partisan differences, and acting in the best interests of their office, the Constitution, and the country. Rather than foreclose discussion before the conversation even starts, your institution can choose to be exemplary and lead a dialogue on the relative merits of the President's

nominee and how it may serve the Court and the Constitution and the country. There is no good or principled reason to shut down that dialogue before it even starts. Not holding such a dialogue is unprecedented, and will only hurt the Supreme Court further. It serves no constitutional good that I can see.

For everything comes at a cost, including the choice to do nothing. The most important cost, if the Senate chooses to do nothing, will be to the Supreme Court and the administration of justice. At the very least, doing nothing leaves the Supreme Court without a ninth justice and thus with only eight justices and thus subject to 4-4 splits, which leaves the country with no meaningful Court opinion or decision at all in a series of cases. The Court is politically constructed; presidents and senators, working together, have shared the responsibility to ensure the Court is fully functional. What a bizarre precedent it would be for the Senate cut off the confirmation process automatically, with almost a full year left in a president's term, and to do so on the coarsest basis one could imagine.

We have long heard that the Constitution is not a suicide pact. We could not have arrived at the present moment if the American people and our past leaders thought it was. Nothing in the Constitution demands that the American people should hurt themselves or their institutions in presidential election years. The Constitution does not require the political branches, usually charged with constructing the Supreme Court, to do nothing in the early months of a president's last full year in office. Pretending that the Constitution requires, or even allows such a self-defeating and disastrous outcome, will do more than hurt the Supreme Court. More than the Court is being held hostage. If we had a war or a natural disaster, God forbid, the American people do not expect or want their leaders to sit on their hands and do nothing simply because it is a presidential election year. The Constitution does not cease to have effect at certain times of the year or season.

In the midst of a different time, a time in which the American republic was being ripped down the middle, a different president stood before the American people, making an appeal, at the outset of Civil War, to "the better angels of our nature." In the midst of the Civil War, Abraham Lincoln never ceased to be president, and Congress did not take a holiday. President Lincoln never doubted for a moment that he had all the powers that the Constitution gave to the President of the United States. He never shirked his duties, not for a moment. He never stopped trying to govern. Indeed, he even made five Supreme Court nominations, which the Senate approved, all while the nation was at Civil War. Woodrow Wilson did the same during the course of World War I, and President Franklin Roosevelt made three Supreme Court nominations during the Second World War. Today, you and your colleagues should aspire to do no less. Today, even in the midst of an election year, you can do what Presidents Lincoln and Roosevelt – and the Senate -- did under much more stressful, extreme conditions. The Senate can do its job.